

The Honorable James L. Robert

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON

MARK A. ARTHUR and CIRILO
MARTINEZ, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

SALLIE MAE, INC.,

Defendant.

NO. C10-0198 JLR

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF PURSUANT TO
47 U.S.C. § 227 *ET SEQ.* (TELEPHONE
CONSUMER PROTECTION ACT)**

Demand for Jury Trial

Plaintiffs Mark A. Arthur and Cirilo Martinez (hereinafter referred to as "Plaintiffs"),
individually and on behalf of all others similarly situated, allege on personal knowledge,
investigation of their counsel, and on information and belief as follows:

I. NATURE OF ACTION

1. Plaintiffs bring this action for damages, and other legal and equitable remedies,
resulting from the illegal actions of Sallie Mae, Inc. (hereinafter referred to as "Sallie Mae" or
"the Company" or "Defendant"), in negligently, knowingly, and/or willfully contacting
Plaintiffs on Plaintiffs' cellular telephones without their prior express consent within the

FIRST AMENDED CLASS ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF PURSUANT
TO 47 U.S.C. § 227 *ET SEQ.* (TELEPHONE
CONSUMER PROTECTION ACT) - 1
CASE No. C10-0198 JLR

TERRELL MARSHALL & DAUDT PLLC
3600 Fremont Avenue N.
Seattle, Washington 98103
TEL. 206.816.6603 • FAX 206.350.3528

meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (hereinafter referred to as the “TCPA”).

2. Sallie Mae is a Delaware corporation that maintains its headquarters at 12061 Bluemont Way, Reston, Virginia. Sallie Mae, through its subsidiaries, provides education finance throughout the United States. Its primary business is to originate and hold student loans by providing funding, delivery, and servicing support for education loans. The Company, which provides its loans by participating in the Federal Family Education Loan Program (“FFELP”) and by offering non-federally guaranteed Private Education Loans (“PELs”), is the nation’s leading provider of savings-and-paying-for-college programs. Through its subsidiaries, the Company manages \$180 billion in education loans and serves ten million student and parent customers. Through its Upromise affiliates, the Company also manages more than \$17.5 billion in 529 college-savings plans, and is a major, private source of college funding contributions in America with ten million members and more than \$475 million in member rewards. (*See Corporate Overview, available at* http://SallieMae.com/about/corp_leadership/) (last visited March 19, 2010).

II. JURISDICTION AND VENUE

3. This matter in controversy exceeds \$5,000,000, as each member of the proposed Class of tens of thousands is entitled to up to \$1,500.00 in statutory damages for each call that has violated the TCPA. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). Further, Plaintiffs allege a national class, which will result in at least one Class member belonging to a different state. Therefore, both elements of diversity jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

4. Venue is proper in the United States District Court for the Western District of Washington pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1441(a), because Defendant is a corporation that is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced, and because Defendant's contacts with this

District are sufficient to subject it to personal jurisdiction. Venue is also proper in this District because Plaintiff Arthur has resided in this District at all times relevant to these claims such that a substantial part of the events giving rise to the claims occurred in this District.

III. PARTIES

5. Plaintiff Mark A. Arthur is, and at all times mentioned herein was, an individual citizen of the State of Washington, who resides in Seattle, Washington.

6. Plaintiff Cirilo Martinez is, and at all times mentioned herein was, an individual citizen of the State of Michigan, who resides in Paw Paw, Michigan.

7. On information and belief, Plaintiffs allege that Sallie Mae is, and at all times mentioned herein was, a corporation whose primary corporate address and headquarters are in Reston, Virginia, and that Sallie Mae does business throughout the country, including this District.

IV. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 (TCPA), 47 U.S.C. § 227

8. In 1991, Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA),¹ in response to a growing number of consumer complaints regarding certain telemarketing practices.

9. The TCPA regulates, among other things, the use of automated telephone equipment, or “autodialers.” Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.²

10. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

² 47 U.S.C. § 227(b)(1)(A)(iii).

greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.³

11. On January 4, 2008, the FCC released a Declaratory Ruling wherein it confirmed that autodialed and prerecorded message calls to a wireless number by a creditor (or on behalf of a creditor) are permitted only if the calls are made with the “prior express consent” of the called party.⁴ The FCC “emphasize[d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.”⁵

V. FACTUAL ALLEGATIONS

Plaintiff Arthur’s Allegations

12. At all times relevant, Plaintiff Arthur was an individual residing in the State of Washington. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153(10).

13. Beginning in or around 2003 when Plaintiff Arthur started law school, he took out a number of loans with Sallie Mae to cover the cost of his schooling.

14. In Plaintiff Arthur’s Sallie Mae Signature Student Loan Applications and Promissory Notes, he did not list any cellular telephone number.

15. Plaintiff Arthur did not list a cellular phone number in or on any other documents at any time during the transaction that resulted in the debt owed to Sallie Mae, nor did he verbally provide Sallie Mae with a cellular phone number at any time during the transaction that resulted in the debt owed to Sallie Mae.

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (“FCC Declaratory Ruling”), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008).

⁵ *FCC Declaratory Ruling*, 23 F.C.C.R. at 564-65 (¶ 10).

1 **Plaintiff Martinez's Allegations**

2 16. Plaintiff Martinez is an individual residing in the State of Michigan. Plaintiff
3 Martinez is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C.
4 § 153(10).

5 17. Beginning in or around 1997 when Plaintiff Martinez started law school, he took
6 out a number of loans with Sallie Mae to cover the cost of his schooling.

7 18. In Plaintiff Martinez's Sallie Mae Signature Student Loan Applications and
8 Promissory Notes, he did not list any cellular telephone number as he did not own a cellular
9 phone at that time.

10 19. Plaintiff Martinez did not list a cellular phone number in or on any other
11 documents at any time during the transaction that resulted in the debt owed to Sallie Mae, nor
12 did he verbally provide Sallie Mae with a cellular phone number at any time during the
13 transaction that resulted in the debt owed to Sallie Mae.

14 **Plaintiffs' Joint Allegations**

15 20. Sallie Mae is, and at all times mentioned herein was, a corporation and a
16 "person", as defined by 47 U.S.C. § 153(10).

17 21. Notwithstanding the fact Plaintiffs did not provide Sallie Mae with their cellular
18 number at any time during the transaction that resulted in the debt owed to Sallie Mae, Sallie
19 Mae repeatedly contacted Plaintiffs on Plaintiffs' cellular telephones. Plaintiffs received
20 repeated, harassing calls at all hours and often received telephone calls within one hour of each
21 other. Because these calls were prerecorded, Plaintiffs had no ability to request that the calls
22 end or to voice their complaints to a real person.

23 22. All telephone contact by Sallie Mae to Plaintiffs on their cellular telephone
24 occurred via an "automatic telephone dialing system," as defined by 47 U.S.C. § 227(a)(1), and
25 all calls that are the subject of this Complaint occurred within four years of the filing of this
26 Complaint.

1 23. The telephone calls placed by Sallie Mae to Plaintiffs' cellular telephone via the
2 automatic telephone dialing system used "an artificial or prerecorded voice" as described in 47
3 U.S.C. § 227(b)(1)(A).

4 24. The telephone number that Sallie Mae used to contact Plaintiffs, with a
5 "prerecorded voice" made by an "automatic telephone dialing system," was assigned to a
6 cellular telephone service as specified in 47 U.S.C. § 227(b)(1)(A)(iii).

7 25. The complained of telephone calls constituted calls not for emergency purposes
8 as defined by 47 U.S.C. § 227(b)(1)(A)(i).

9 26. "During the transaction that resulted in the debt owed," Plaintiffs did not
10 provide a wireless number to Sallie Mae nor otherwise provide express consent to receive
11 prerecorded calls by Sallie Mae on Plaintiffs' cellular telephone.⁶

12 27. Plaintiffs did not own their current cellular telephone at the time they took out
13 their loans. They therefore could not have given Sallie Mae express consent at that time to
14 contact them on that cellular phone via an automatic telephone dialing system.

15 28. Plaintiffs did not provide "express consent" allowing Sallie Mae to place
16 telephone calls to Plaintiffs' cellular phone utilizing an "artificial or prerecorded voice" or
17 placed by an "automatic telephone dialing system," within the meaning of 47 U.S.C. §
18 227(b)(1)(A).

19 29. Sallie Mae did not make telephone calls to Plaintiffs' cellular phone "for
20 emergency purposes" utilizing an "artificial or prerecorded voice" or placed by an "automatic
21 telephone dialing system," as described in 47 U.S.C. § 227(b)(1)(A).

22 30. Sallie Mae's telephone calls to Plaintiffs' cellular phone utilizing an "artificial
23 or prerecorded voice" or placed by an "automatic telephone dialing system" for non-emergency
24
25

26 ⁶ See *FCC Declaratory Ruling*, 23 F.C.C.R. at 564-65 (¶ 10).

1 purposes and in the absence of Plaintiffs' prior express consent violated 47 U.S.C. §
2 227(b)(1)(A).

3 31. Under the TCPA and pursuant to the FCC's January 2008 Declaratory Ruling,
4 the burden is on Sallie Mae to demonstrate that Plaintiffs provided express consent within the
5 meaning of the statute.⁷

6 VI. CLASS ACTION ALLEGATIONS

7 32. Plaintiffs bring this action on behalf of themselves and on behalf of all other
8 persons similarly situated (hereinafter referred to as "the Class").

9 33. Plaintiffs propose the following Class definition, subject to amendment as
10 appropriate:

11 All persons within the United States who, on or after October 27,
12 2005, received a non-emergency telephone call from Sallie Mae
13 to a cellular telephone through the use of an automatic telephone
14 dialing system or an artificial or prerecorded voice and who did
not provide prior express consent for such calls during the
transaction that resulted in the debt owed.

15 Collectively, all these persons will be referred to as "Class members." Plaintiffs represent, and
16 are members of, the Class. Excluded from the Class are Sallie Mae and any entities in which
17 Sallie Mae has a controlling interest, Sallie Mae's agents and employees, the Judge to whom
18 this action is assigned and any member of the Judge's staff and immediate family, and claims
19 for personal injury, wrongful death and/or emotional distress.

20 34. Plaintiffs do not know the exact number of members in the Class, but based
21 upon the representations of Sallie Mae as to its market share, Plaintiffs reasonably believe that
22 Class members number at minimum in the tens of thousands.

23 35. Plaintiffs and all members of the Class have been harmed by the acts of Sallie
24 Mae.

25 36. This Class Action Complaint seeks money damages and injunctive relief.

26 ⁷ See *FCC Declaratory Ruling*, 23 F.C.C.R. at 565 (¶ 10).

1 37. The joinder of all Class members is impracticable due to the size and relatively
 2 modest value of each individual claim. The disposition of the claims in a class action will
 3 provide substantial benefit the parties and the Court in avoiding a multiplicity of identical suits.
 4 The Class can be identified easily through records maintained by Sallie Mae.

5 38. There are well defined, nearly identical, questions of law and fact affecting all
 6 parties. The questions of law and fact involving the class claims predominate over questions
 7 which may affect individual Class members. Those common questions of law and fact include,
 8 but are not limited to, the following:

9 a. Whether, beginning on October 27, 2005, Sallie Mae made non-
 10 emergency calls to Plaintiffs and Class members' cellular telephones using an automatic
 11 telephone dialing system or an artificial or prerecorded voice;

12 b. Whether Sallie Mae can meet its burden of showing it obtained prior
 13 express consent (*i.e.*, consent that is clearly and unmistakably stated), during the transaction
 14 that resulted in the debt owed, to make such calls;

15 c. Whether Sallie Mae's conduct was knowing and/or willful;

16 d. Whether Sallie Mae is liable for damages, and the amount of such
 17 damages; and

18 e. Whether Sallie Mae should be enjoined from engaging in such conduct
 19 in the future.

20 39. As persons who received numerous and repeated telephone calls using an
 21 automatic telephone dialing system or an artificial or prerecorded voice, without their prior
 22 express consent within the meaning of the TCPA, Plaintiffs assert claims that are typical of
 23 each Class member. Plaintiffs will fairly and adequately represent and protect the interests of
 24 the Class, and have no interests which are antagonistic to any member of the Class.

25 40. Plaintiffs have retained counsel experienced in handling class action claims
 26 involving violations of federal and state consumer protection statutes such as the TCPA.

41. A class action is the superior method for the fair and efficient adjudication of this controversy. Class wide relief is essential to compel Sallie Mae to comply with the TCPA. The interest of Class members in individually controlling the prosecution of separate claims against Sallie Mae is small because the statutory damages in an individual action for violation of the TCPA are small. Management of these claims is likely to present significantly fewer difficulties than are presented in many class claims because the calls at issue are all automated and the Class members, by definition, did not provide the prior express consent required under the statute to authorize calls to their cellular telephones.

42. Sallie Mae has acted on grounds generally applicable to the Class, thereby making final injunctive relief and corresponding declaratory relief with respect to the Class as a whole appropriate. Moreover, on information and belief, Plaintiffs allege that the TCPA violations complained of herein are substantially likely to continue in the future if an injunction is not entered.

VII. CAUSES OF ACTION

FIRST COUNT

**NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION
ACT 47 U.S.C. § 227 *ET SEQ.***

43. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

44. The foregoing acts and omissions of Sallie Mae constitute numerous and multiple negligent violations of the TCPA, including but not limited to each of the above cited provisions of 47 U.S.C. § 227 *et seq.*

45. As a result of Sallie Mae's negligent violations of 47 U.S.C. § 227 *et seq.*, Plaintiffs and Class members are entitled to an award of \$500.00 in statutory damages for each and every call in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

46. Plaintiffs and Class members are also entitled to and do seek injunctive relief prohibiting Sallie Mae's violation of the TCPA in the future.

47. Plaintiffs and Class members are also entitled to an award of attorneys' fees and costs.

SECOND COUNT

KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227 *ET SEQ.*

48. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as if fully stated herein.

49. The foregoing acts and omissions of Sallie Mae constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

50. As a result of Sallie Mae's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiffs and each member of the Class is entitled to treble damages of up to \$1,500.00 for each and every call in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

51. Plaintiffs and all Class members are also entitled to and do seek injunctive relief prohibiting such conduct violating the TCPA by Sallie Mae in the future.

52. Plaintiffs and Class members are also entitled to an award of attorneys' fees and costs.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant Plaintiffs and all Class members the following relief against Defendant:

A. As a result of Sallie Mae's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiffs seek for themselves and each Class member \$500.00 in statutory damages for each and every call that violated the TCPA;

1 B. As a result of Sallie Mae's willful and/or knowing violations of 47 U.S.C.
2 § 227(b)(1), Plaintiffs seek for themselves and each Class member treble damages, as provided
3 by statute, of up to \$1,500.00 for each and every call that violated the TCPA;

4 C. Injunctive relief prohibiting such violations of the TCPA by Sallie Mae in the
5 future;

6 D. An award of attorneys' fees and costs to counsel for Plaintiffs and the Class;

7 E. An order certifying this action to be a proper class action pursuant to Federal
8 Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court
9 deems appropriate, finding that Plaintiffs are proper representatives of the Class, and
10 appointing the lawyers and law firms representing Plaintiffs as counsel for the Class;

11 F. Such other relief as the Court deems just and proper.

12 **IX. DEMAND FOR JURY TRIAL**

13 Plaintiffs demand a trial by jury on all counts so triable.

14 DATED this 5th day of April, 2010.

15 TERRELL MARSHALL & DAUDT PLLC

16
17 By: /s/ Beth E. Terrell, WSBA # 26759

18 Beth E. Terrell, WSBA #26759

19 Email: bterrell@tmdlegal.com

20 Michael D. Daudt, WSBA #25690

21 Email: mdaudt@tmdlegal.com

22 Marc C. Cote, WSBA #39824

23 Email: mcote@tmdlegal.com

24 3600 Fremont Avenue North

25 Seattle, Washington 98103

26 Telephone: 206.816.6603

Facsimile: 206.350.3528

Jonathan D. Selbin, *Admitted Pro Hac Vice*

Email: jselbin@lchb.com

Alison Stocking, *Admitted Pro Hac Vice*

Email: astocking@lchb.com

LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP

250 Hudson Street, 8th Floor

New York, New York 10013

Telephone: 212.355.9500

Facsimile: 212.355.9592

Daniel M. Hutchinson, *Admitted Pro Hac Vice*

Email: dhutchinson@lchb.com

LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP

Embarcadero Center West

275 Battery Street

San Francisco, California 94111-3339

Telephone: 415.956.1000

Facsimile: 415.956.1008

David P. Meyer, *Admitted Pro Hac Vice*

Email: dmeyer@dmlaws.com

Matthew R. Wilson, *Admitted Pro Hac Vice*

Email: mwilson@dmlaws.com

DAVID P. MEYER & ASSOCIATES CO., LPA

1320 Dublin Road, Suite 100

Columbus, Ohio 43215

Telephone: 614.224.6000

Facsimile: 614.224.6066

Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on April 5, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kenneth E. Payson, WSBA #26369
Email: kenpayson@dwt.com
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Telephone: 206.622.3150
Facsimile: 206.757.7700

Lisa M. Simonetti, *Admitted Pro Hac Vice*
lsimonetti@stroock.com
Julia B. Strickland, *Admitted Pro Hac Vice*
jstrickland@stroock.com
STROOCK & STROOCK & LAVAN LLP
2029 Century Park East, Suite 1600
Los Angeles, California 90067
Telephone: 310.556.5819
Facsimile: 310.556.5959

Attorneys for Defendant

DATED this 5th day of April, 2010.

TERRELL MARSHALL & DAUDT PLLC

By: /s/ Beth E. Terrell, WSBA # 26759
Beth E. Terrell, WSBA # 26759
Email: bterrell@tmdlegal.com
3600 Fremont Avenue North
Seattle, Washington 98103
Telephone: 206.816.6603
Facsimile: 206.350.3528

Attorneys for Plaintiffs